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THE REFORM OF JUDICIAL PROCEDURE.

NECESSITY FOR AN EQUABLE DIVISION OF POWER BETWEEN THE LEGISLATIVE AND JUDICIAL DEPARTMENTS.

A RIP VAN WINKLE, awakened during the second decade of the twentieth century, would be amazed by the magnificent railroads that have taken the place of the road cart, by the swift steamships that now tower above the little sailing schooner, by the splendid glow of electric lights that have made useless the humble tallow candle, by the scientifically equipped hospitals and commodious and sanitary school buildings, and last but not least, by the imposing courthouse buildings whose Corinthian columns and ornate interiors impress even a modern-day observer. He would see the forward strides of seven-league boots in education, civilization, commerce, transportation, science and art, but he would observe the progress of the snail in judicial procedure. Bewildered at all things else he would stand awestruck before the portals of the temples of Justice; but before the bench and at the bar, he would feel at home. The text-book on pleading and procedure that rotted by his side a half century ago would serve him today. He need only become familiar with certain "statutory amendments," the crutches upon which decrepitude has hobbled these fifty years or more.

JUDICIAL PROCEDURE UNDEVELOPED.

While the commercial and social advancement of this great American nation, proceeding under a well-organized co-ordination, has become the wonder and envy of the world, its court pro-

cedure has lagged behind, a patched-up creature of another age that incongruously parades with this generation. When it has not taken the form of the ghost of an abandoned past, clothed in metaphysical subtleties, it has been enveloped in a mesh of legislative experiments and innovations, the latter state of affairs being worse than the former. The trial lawyer is becoming not so much a profound student of the law, its science and its purposes, as he is a nimble-witted, special pleader, equipped with an alarming supply of procedural technicalities. This is spoken not in criticism, but as a statement of one of the obvious results of the conditions named.

THE RESULT.

The courts that were established for the use of commerce and society, have become the fencing schools of highly-trained pleaders. In a demoralizing number of cases the issue is never reached, because the cause is decided on technicalities of pleading and procedure. The average brief lays emphasis, not so much upon the actual wrong of the judgment of which complaint is made, as upon the fact that it was not obtained exactly in the manner provided piecemeal by a hurried and harassed legislature. Justice, to that extent, has been subordinated to technicality, and profundity has had to give place to subtlety. Such a condition is subversive of good government, for it destroys the necessary faith in courts and lawyers alike. Laymen have ever taken pride in their great and profound lawyers and judges, but they have no place in their hearts for the mountebank. Man is to a great extent a creature of circumstance, and a lawyer's development will respond to the character of the demands made upon him and the conditions surrounding him. He is engaged to win, and he can use only the tools provided for him and in the manner prescribed or give up the profession of the law.

THE AWAKENING.

But "our bravest lessons are not learned through success but misadventure." The unbridled criticisms of the courts and of the lawyers that have become so fashionable, the suicidal theory of the recall, and the threat of further impractical statutory procedure

have served a useful purpose. A crisis has been precipitated that has prepared the way for a rich harvest of unselfish public spirit, the result of seed that have been diligently sown during the last half decade. It is no longer a debatable question that there is something wrong with the judicial department of the government. A correct diagnosis and a speedy application of the proper remedy is the work at present before us. Judges and lawyers began to realize that the tools and machinery of their profession, as furnished by the legislative department, were bringing discredit upon their fair name and their work and that they would eventually lower the standing of the judge and the lawyer. Forthwith there came the demand that, if the bench and bar were to be held responsible for the results of the procedure of the courts, they, and not the legislatures, should be allowed to prepare that procedure. This demand has now reached the dignity of a national issue; but, before becoming so, the bench and bar suffered from undeserved criticism until submission ceased to be a virtue and became a menace to the most important of the three departments of government.

The Campaign Inaugurated.

These troubling thoughts sunk deep into the souls of men whose first love was for their country. Their eyes were lifted above the courts, above their vocation, to the high level of their duty as citizens and leaders of society. "America," said Mr. Burke, "owes its love of liberty to its lawyers and the people who understand the principles of government;" and it may be added that America will comfort and support its lawyers in the demand for such a division of power as is needed for the proper operation of the machinery of the courts. The sense of the personal duty owed by the lawyers to the public and to the courts, that is inseparable from the high calling of their profession, has been electrified into a living, militant agency of reform. It has developed into an intelligent, organized effort, in which judges, lawyers and laymen are co-operating. With a dynamic force, a self-abnegation and a display of patriotism unexcelled in any time or age, the judges and lawyers of this country have set about putting the procedure of the courts upon the high level of the day in which they live. They are

demanding the right to quicken its laggard feet that it may keep stride with the splendid commerce that long since outstripped and that has now almost lost sight of it.

With this end in view, the first "Conference of Judges" in the history of the United States was held in Montreal on August 30th, a thing that was pronounced impossible a year ago. Many thoughtful persons had refused to believe that the State and federal appellate courts would seriously entertain the idea of concerted action looking to uniformity of procedure or of decisions. These critics had underestimated, however, the big, broad-minded men selected to perform the highest judicial duties of this country. The judges are giving their best thought and effort to the work of perfecting the most important of governmental relations, regardless of convenience or compensation. Like John Marshall, they rise to the demands of the day, but their encomiums will come chiefly from the mouths of future generations. The chief justices of the States, the senior federal judge of the nine federal circuits, the chief justice of the District of Columbia and a federal judge from Porto Rico, or their alternates, in order to attend this conference, paid their own expenses out of their meagre salaries.

The men of commerce have also grasped the opportunity and are contributing the weight of their great influence. Convinced of the sincerity and earnestness and unselfishness inspiring the propaganda, and realizing the merits of the proposed reform, the National Association of Credit Men and the Chamber of Commerce of the United States have both entered actively into the campaign. They have adopted suitable resolutions and appointed appropriate committees. The American Bar Association has given its unanimous support and placed a committee, generously provided with funds, in charge of the campaign. This action has been followed by the endorsement of about forty States. New Jersey, Massachusetts, Colorado, Illinois, and the great State of New York, the latter being the birthplace of "Code Pleading," are actually putting the plan into effect. The Virginia State Bar Association in July, 1913, requested the Legislature of that State to enact the necessary enabling statute; and it will undoubtedly be done. Ex-President Taft, now President of the American Bar Association, is participating in the campaign with the same earnestness and

vigor that marked his administration as President of the United States. President Wilson will endorse it in an official message and call upon Congress to enact the necessary statute. Attorney General McReynolds made an able address before the "Conference of Judges" in its behalf, committing himself and the Administration. Judge Henry D. Clayton, chairman of the Judiciary Committee of the House of Representatives, is the patron of the bill introduced in Congress. The National Civic Federation and many other civic and business organizations are losing no opportunity to lend aid and sympathy.

A New National Era.

These things mark the beginning of a new national era that promises interstate judicial relations,—fixed and permanent as interstate commercial relations,—as certainly as men under a deep conviction can fight for the right on a common ground. The one depends upon fundamental law and exists by virtue of duress; the other draws its life from unselfish patriotism and will live in response to commercial necessity and convenience. Already the decisions of other States are being sought and adopted; therefore, there is nothing novel in the thought. The country is demanding uniform law; but it is idle to enact uniform statutes unless there be uniformity in decisions. Two long strides towards that much desired goal are "uniformity in procedure" and the annual "Conference of Judges." The latter is now assured. Upon the lawyers and the legislatures and Congress rest the responsibility of the former. That the lawyers are performing their duty is amply evidenced; and, in the present state of public sentiment, it is inconceivable that Congress and the legislatures may not be depended upon to do their part. There are few public movements of the present day that mean so much to the general welfare, to comity, and to closer commercial and social relations amongst the States. The agitation of the question is opening the eyes of commerce and of society to their real relation and duty to the bench and the bar.

Present Necessary Legislation.

So, the first step in the program is the emancipation of the courts by the legislative departments of the State and federal

governments in the manner set forth in the "Clayton Bill," now pending in Congress, and in the resolutions adopted by the Virginia State Bar Association, making provision for an equable division of power between the legislatures and the courts. After this is done, what remains will offer no real obstacles other than those to be encountered in forwarding the present campaign of education. It is timely to observe that the only objections raised to the program are that the Supreme Court has not the time to do the work, that the procedure of the States would be altered to the disadvantage of the old lawyer, and that Congress and the legislatures of the several States would object to parting with the power and vesting it in the courts. The Supreme Court has answered the first objection by evidencing its readiness and willingness to perform this duty as it has performed all others entrusted to it. This criticism was ably met and resented on the floor of the American Bar Association in September, 1913, and should forever be at rest. The answer is that every State in the Union, except New Hampshire and Vermont, is undergoing a revolution in its procedure. A change is inevitable. The answer to the third is that, inasmuch as the power would be given by the legislature, it could be recalled by the legislature in the event that it should be abused. Only one other objection has been raised in the committee rooms and that one is of a personal and probably selfish nature. The nervous lawyer, apprehensive lest the system of rules may not suit his notion, should find consolation in the assurance that the Supreme Court will seek the views of the bar. There will be offered him an opportunity that otherwise he would not have, for impressing his views upon the system.

Uniformity in Procedure.

Once Congress has enacted this enabling statute and the Supreme Court has prepared and promulgated the system of rules for practice on the law side of the inferior federal courts, a model system will be invitingly offered to the States with the chances largely in favor of its adoption. And it may be said that the destiny of uniformity in procedure no longer remains solely with the lawyers. The demand of commerce is growing insistent and

is nation-wide. The minds of practical men of business, directed to it by the campaign of the American Bar Association, are set upon simplification of procedure; and the legislatures are likely to respond. It is not strange that they should approve of any program endorsed by the American Bar Association and so many State bar associations. The time is ripe, therefore, for a change and one that will be complete. Let the present unscientific procedure in the courts be wiped from the statute books and in its place be adopted a system based upon a principle by which the legislature will do those things best suited to its authority and power and the courts will do those things for which they are prepared and trained and the science of which they understand.

Division of Power between Legislatures and Courts.

Into this thought enters the idea of an equable division of power between the legislative and judicial departments of government. This is the principle underlying the new plan that is being so vigorously pressed. The program of the American Bar Association proposes to divide all judicial procedure into two classes, viz: (a) jurisdictional and fundamental matters and general procedure and (b) the rules of practice directing the manner of bringing parties into court and the course of the court thereafter. The first class goes to the very foundation of the matter and may aptly be denominated the legal machine through which justice is to be administered, as distinguished from the actual operation thereof. It prescribes what the court may do, who shall be the parties participating, and fixes the rules of evidence and all important matters of procedure. The second concerns only the practice, the manner in which these things shall be done, that is, the details of their practical operation. Concisely stated, the first class provides *what* the courts may do, while the second regulates *how* they shall do it. Out of this has been educed a plan, which is embodied in the simple statute to which reference has been made, a statute that has met with well-nigh universal approval. This statute will necessitate no alteration of the present procedure upon any jurisdictional or fundamental matter. Therefore, the preparation of a "Practice Act" or "Code," or the revision of the code, is a subject entirely apart. After the

rules are prepared there may be reason for the consideration of that subject, or there may not.

It Appeals Practically and Technically.

Justification may be found for this proposed diversion in the necessity for the preservation of a due balance between the legislative and judicial departments of government. It appeals, moreover, to logic and to the eternal fitness of things, inasmuch as it provides for a common-sense division of the actual labor to be performed and the responsibilities to be borne. While the legislative department should retain arbitrary control over the courts as an agency to an end, obviously, the best results to be derived from the operation of the plan are to be obtained by taking advantage of the genius, ability, preparation, experience and profound knowledge of the judges and lawyers, who, as officers of the court, personally conduct it.

But there is a psychological aspect not to be underestimated. The sense of responsibility will awaken a new and unselfish interest on the part of the members of the bar, and will inspire their best efforts. Personal pride will play an important part in inducing them to support and maintain the new regime that would owe its existence in large measure to the aid contributed by them. This is really the human crux of the whole scheme. Moreover, it will give to the people the benefit of the advice of their ablest lawyers and will guide their criticisms in a harmless manner to a personally responsible and responsive agency. Lawyers will be transformed from the hostile critics that they now are into the militant, helpful supporters that they should be. It will go out of fashion for them to pick flaws, even if it could then be considered ethical to do so.

An Inconsistent Conflict.

Now, with the legislative departments prescribing the most trifling details and disregarding improvements suggested by bar associations, there is nothing for the judge and the lawyer to do but to submit and follow as best they may. This they have done nigh unto half a century, but not without loss of prestige; not without a lessening of popular confidence in the courts and law-

yers, and not without the temporary lodgment of certain dangerous doctrines in the hearts of the people. That resentment, as well as a critical mental attitude, should be manifested on the part of the bar to this involuntary bondage is characteristic of the American people.

The real trouble with judicial procedure at present is due to the fact that co-ordination has been absolutely destroyed by exclusive legislative control. A practical view of the situation will serve to illustrate the truth of this statement. As matters stand now, the exact manner in which litigation may be conducted is laid out entirely in the form of rigid, uncompromising statutes, or by the ancient common law made over by statutes, enacted by men more earnest than prepared and more apprehensive than profound. And the bench and the bar rest under a solemn oath of qualification to defend and support these statutes. Lawyers and judges are intrusted with no part in the matter, although they represent the sole human element connected with its actual operation. No board of directors of an industrial corporation would do such an illogical thing; they would seek the practical and scientific advice of the men in the mill and place upon them all consistent responsibility. There is a striking analogy between the two cases.

When, therefore, the lawyer places insurmountable barriers in the path of the court in its journey to the goal established and set up by justice and the merits of the cause, instead of being actuated by sinister and corrupt motives, he is merely seeking the enforcement of the statutes and asking that government be conducted in the manner that the legislative branch has seen fit to enact and provide. He is doing merely his duty under his oath and so is the judge who permits him so to proceed. What is the result? The lawyer acquires a reputation, and, since he has earned it by enforcing the law, he is entitled to it. This course is neither unethical nor reprehensible. But what of the judge, who, likewise, has but done his duty? He stands alone to receive the condemnation of the litigant and eventually that of a dissatisfied and distrustful people, who do not understand and who can not understand; they would not know where to seek relief, even if it were possible for them to analyze the situation.

Judging only from results, they are justified from their point of view, in feeling that the thing nearest to them which is apparently doing the wrong should be throttled and destroyed. They do not know that the legislative branch of government has tied the hands of the judges and so placed them that they must be set upon by lawyers instead of being assisted by them, that it has refused to allow the State to receive the benefit of the co-operative learning, training and ability of its bench and bar. Therefore, as a result we have the recall and other symptoms of restlessness and dissatisfaction.

This is one of the results of "Code Pleading" which is exclusively legislative. It is one of the results of common-law pleading, long since abandoned *in propria persona,* but much alive as a legislative tatterdemalion in which form resides its chastened spirit. The proposed new plan will co-ordinate the entire bar and the judicial and legislative departments and enable each to perform its proper mission. There is justification for the belief that such was the evident intent of the founders of government in this country.

EXCLUSIVE JUDICIAL POWER EQUALLY AS OBJECTIONABLE.

We may not consider exclusive judicial power, for that would place in the hands of the judicial department control over fundamental and jurisdictional matters and general procedure. Such a grant of power would be in conflict with the spirit of our republican institutions, if, indeed, it would not violate the basic constitutional principles in which they rest. It is necessary to advert to it, however, since it is the antithesis of "Code Pleading"; and a happy mean between the two extremes is what has been found to be most desirable. A sensible limitation must, therefore, be placed upon the power of the courts, a matter already effectuated to an extent by suitable statutory measures, as well as upon the executive and the legislative departments. But this limitation must not go to such an extreme as to defeat co-ordination, else the latter state of affairs will be as bad as the former. The statute recommended by the Virginia State Bar Association and the Federal statute known as the "Clayton Bill," which has been endorsed by the American Bar Associa-

tion and about forty State bar associations, unquestionably meet the situation.

The New System.

The proposed new plan, it may be observed, lies midway between the "all legislative" and the "all court" systems. If adopted, it would eventually assume a fixed place in jurisprudence and would be appropriately identified. It proposes to vest in the supreme appellate court of each State and of the federal government the exclusive power to prepare for the respective nisi prius courts all necessary rules and regulations and the power, likewise, to amend and alter them at the call of convenience or the demand of justice. From this duty the legislative department would necessarily withdraw. All future pleading and practice would be in accordance with simple, correlated and scientific rules of court instead of being regulated by rigid, inflexible statutes, amendable only by legislative act. Of the form to be taken by these rules, it is not now in order to speak. The premature discussion of this subject is the only obstacle that need be feared. The true friends of procedural reform will not take it up out of its order. There will come a time for that after the change in the statute law has been made.

The able and patriotic men in whose hands has been placed the machinery of the highest court of each State and of the nation may be trusted in this vital situation. In an orderly manner opportunity will be afforded the lawyers to share both the labor and the responsibility. The task of the lawyers at present is to inform the people and their legislative representatives of the merit and good policy of and the absolute necessity for a proper division of duty and power between the legislative and judicial departments of government. This is the sole issue, for the time being. It is a condition precedent to the consideration of anything else. But it is necessary to call attention at this point to the urgent need for some authorized, competent agency clothed with supreme and final authority, to whose care may be intrusted the adjustment and determination of the matters in question. If this be not done, the whole project will be wrecked; for the experience of the past half century has fully demonstrated the inability of lawyers to come to an agreement. This

idea is one of the merits of the program and one that makes a strong appeal.

A fixed program for effecting the desired change in Virginia and other States may now be considered. The Supreme Appellate Court itself may prepare the rules in the light of suggestions solicited from the bar; it may request the aid of a paid commission, as has been recently suggested by able Virginia authority; or it may follow the unanimous recommendations of the Virginia State Bar Association and the American Bar Association and adopt the new federal equity rules, modifying them as may appear necessary to suit conditions, and thus establish uniformity of procedure. With the same object in view, it may adopt, when prepared, the new federal rules for the law side of the courts. There is reason to believe that the federal Supreme Court, as soon as it has the power, will promulgate an entirely new system, which will do away with all juridical distinction between law and equity. This simple and attractive inducement to uniformity of procedure is the featural merit of the new plan, the merit that has fixed it in the hearts and minds of so many lawyers. It has brought together the bench and bar of this country from ocean to ocean, a condition unique in history. By magnanimously co-operating they will lose nothing and gain everything, including the respect and gratitude of commerce and society.

Not only organized bodies, but individual citizens as well, are nobly and patriotically putting aside all pride of opinion and are calling earnestly upon Congress and their respective State legislatures to pass the necessary enabling act. In the attempt to secure the passage of these acts every lawyer should individually participate. Old Virginia, in times past wont to lead, finds opportunity once again knocking at her door. Her State Bar Association has opened it wide. Will the legislature extend the invitation to enter? It is for the lawyers to answer. What that answer will be no longer remains a matter of doubt. For they have joined forces and are now lending the full measure of their strength to a fight for their emancipation for the contentment of the people, and for the return of the old time veneration for the courts and respect for the bar, a prize worthy of any sacrifice.

Fixed Interstate Judicial Relations.

There looms up out of the vista of this propaganda a possibility resplendent with promise,—interstate judicial relations as fixed and permanent as interstate commercial relations. Pessimists, who only a few years ago denounced that thought as being merely "a vision emanating from an earnest heart," came to the "Montreal Conference" to praise and endorse and support. No man could have looked upon that company of distinguished jurists, the directors of the legal destiny of a nation made up of a union of separate States, without becoming convinced that the State supreme appellate courts were dominated, in spirit at least, by a common purpose, and that a practical consummation of that purpose depended only on the perfecting of a practical working basis, a basis then in process of organization and now complete. The American Bar Association has made the "Conference of Judges" part and parcel of itself with provision for proper officers and annual meetings under the official designation of the "Judicial Section."

There was no constitutional inhibition driving them into a course, but there was a deep and abiding love of the general welfare leading them into a voluntary agreement. And it is well to recall to mind that it is not the conscript but the volunteer that makes the earnest, trusted soldier with the initiative to undertake and the capacity to accomplish. These big, broad-minded men, guided by their reason and their hearts, have publicly consecrated themselves to a great and lasting principle; and, with the financial support and encouragement of a grateful country, they will make of the "Montreal Conference" of 1913 a monument in governmental legal history no less significant and indelible than the "Mount Vernon Conference" of 1785 is in governmental commercial history. They were both epoch-making and both potential. The one has led on to a consummation beyond the bounds of James Madison's far-reaching dreams of the blessings to be derived from the government he helped to establish. The other,—but its history is yet to be written by a bench and bar and a people unexcelled in the annals of the world and in a time when representative democracy is in its flower.

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